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In the Supreme Court of the United States

OCTOBER TERM, 1938.

MRS. ZILIAH LYON ..... Petitioner

vs. No. 189

MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION ..... Respondent

PETITION FOR REHEARING

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CASES CITED

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PETITION FOR REHEARING

Comes now the above named, Mutual Benefit Health and Accident Association, respondent, and presents this, its petition for rehearing of the above entitled cause and in support thereof respectfully shows:

I.

This Court has failed to give effect to all of the provisions of the policy of insurance and has consequently held that Sub-section "C" of the additional provisions of the policy (Record 22-C) is *prima facie* proof of the payment of Seventy-four Dollars ($74.00) in advance for the first year and that the effect of the provisions is to extend the policy term a year beyond the date specified in the policy itself. When the whole of the Sub-section is read it means simply that the first year the policy is in force the total annual premium will amount to Seventy-four Dollars ($74.00) and that subsequently the total annual premiums will amount to Sixty-four Dollars ($64.00), and further means that the premiums may be paid upon a quarterly

basis, beginning with Sixteen Dollars ($16.00) on April 1st, 1927. It is a fundamental rule that all of the provisions of a contract must be read together and the meaning ascertained from the whole.

American Indemnity Co. v. Hood,
183 Ark. 266; 35 S.W. (2) 353.

We feel that upon application of this rule to the clause and policy in question here, the Court's decision would be that the clause has the meaning here contended.

II.

Even if this Court should find upon reconsideration that the clause mentioned above is ambiguous, which is the most that has been contended for it by counsel for petitioner, this case should be reversed and remanded to the District Court with instructions to submit to the jury the question of whether the Seventy-four Dollars ($74.00) was actually paid by the petitioner. The constitution of the state of Arkansas and the constitution of the United States both provide for the right of a trial by jury. This defendant should not be deprived of that right unless there has been a waiver by some act of the respondent. The respondent, after petitioner had given her testimony to the effect that she had paid Seventy-four Dollars ($74.00) in advance, asked the trial Court for a continuance, so as to enable it

> "to make proof to the effect that $74.00 was not paid or received by the Defendant at the time the policy was issued * * * ." (R. 44).

At the same time, counsel for the defendant called the Court's attention to the fact that it had no intimation

that it would even be claimed that $74.00 was paid at the time this policy was issued, and offered to prove that no such claim had ever been made prior to the testimony of the plaintiff in this case. The Court overruled that motion. (R. 45).

We call this Court's attention to the complaint (R. 9) in which the plaintiff detailed facts to the effect that the policy lapsed and expired by its own terms prior to the death of the policyholder, and nowhere in the complaint is there any allegation that $74.00 was paid at the time the policy was issued. It is further significant that in suing for a recovery under the terms of the policy, which would have permitted petitioner to recover all of the said $74.00 premium if it had been actually and in fact paid, petitioner did not seek to recover any part of it.

In this complaint, after using some eight or nine hundred words in pleading an excuse for the failure to pay a premium due on July 1st, 1934, the petitioner pleaded:

> "Third, that said premium had been previously paid and was therefore not due and payable on said 1st day of July and the insured was not liable for payment of same at said time."

This broad, general and indeterminate allegation was controlled by the specific allegations previously made in the complaint and was not notice to counsel for the defendant that such a claim would be made as developed in the testimony of Mrs. Lyon.

The trial court erroneously overruled respondent's motion for a continuance and forced the respondent to

proceed upon an issue not found in the complaint—an issue upon which counsel for respondent had no notice whatsoever. Respondent therefore could not offer any further evidence, though it did clearly show its desire to do so. Can it then be said that the respondent's motion for a directed verdict was a waiver of the right of trial by jury?

Furthermore, as the record shows in this case, respondent had no opportunity to offer further instructions, as the Court upon its own motion immediately instructed the jury to return a verdict (R. 45) and it will likewise be noted that exception was made to the action of the Court.

The case of A. B. Smith Lumber Company v. Portis Bros., 140 Ark. 356, 215 S.W. 590, cited by this Court, does not show that any objection was made to the submission of the case to the Court sitting as a jury, while the record clearly reflects in this case that objection was made. Of course, a failure to save an exception to the action of the Court would be an acquiescence in the action taken by the Court and would be a waiver, but, as shown by the record in this case, there was no acquiescence on the part of the respondent in the action of the Court, nor could there have been a waiver of the right of trial by jury.

In the case of Webber v. Rogers, 128 Ark. 25, 193 S.W. 87, the Court said:

> "But so far as we are advised, no appellate court has held that the trial court may withdraw the submission of a case from the jury and decide con-

troverted questions of fact simply because one of the litigants requests the Court to direct a verdict in his favor. To so hold would either deny the right of trial by jury on the one hand or would prevent a litigant from asking a directed verdict on the other, and would tend to prevent litigants from ever submitting the question of the legal sufficiency of the evidence to the Court."

The cause was remanded by the Supreme Court of Arkansas, with directions to submit the case to the jury. This is a leading case in Arkansas upon this point and has been cited with approval many times, one of the last decisions being Dunford v. Dardanelle & Russellville Railroad Company, 171 Ark. 1086, 287 S.W. 170, decided seven years after the Smith v. Portis case, supra. In the case of Dunford v. Dardanelle & Russellville Railroad Company, the Court in its opinion stated:

"It is the settled practice in this state where both parties asks a directed verdict and neither asks any more instructions **nor offers to produce further testimony**, to treat the case as having been withdrawn from the jury * * * ."

In this case respondent offered to produce further testimony, which the trial court would not permit.

In the case of King v. Bank of Pangburn, 150 Ark. 138, 233 S.W. 920, decided two years after the Smith v. Portis case, the Supreme Court of Arkansas said:

"It is true that **both parties** asked a peremptory instruction, but in addition thereto appellant asked other instructions, and the Court should not, therefore, have directed a verdict against him, if the testimony in his behalf, viewed in the light most favorable to him, would support a verdict in his favor." (Citing Webber v. Rogers, 128 Ark. 25).

Even if this Court does find that the clause concerning payment of premiums is ambiguous and that the testimony of the petitioner may be heard in explanation of the contract, there are particular facts and circumstances in the record which would have clearly authorized a jury to find for the respondent, notwithstanding the fact that the trial court would not permit respondent to obtain evidence to contradict her testimony.

Petitioner carefully preserved her checks, her receipts, the policy, various and sundry letters and all other evidence concerning this policy that came to her hands, yet she did not have any kind of a receipt or memorahdum for the first premium of $74.00, which she says, for the first time at the trial of this case, that she paid. For seven years she accepted receipts stating definitely the date the policy terminated. No objection was ever made by her, and as pointed out in respondent's original brief, the testimony of an interested witness will not be considered as undisputed.

Blankenship v. Modglin, 177 Ark. 388,
65 S.W. (2d) 531.

Judge Stone, of the Eighth Circuit Court of Appeals, in his separate opinion in this case, says:

> " • • • that plaintiff was entitled to the judgment of a jury on the verity of the explanation to which she testified."

Surely, the defendant is entitled to the judgment of a jury on the verity of this testimony.

In the case of National Equtiy Life Insurance Company v. Parker, 190 Ark. 642, 80 S.W. (2d) 630, the Su-

preme Court of Arkansas held that possession of the policy gives rise to a presumption that the premium was paid for the first term, but it also held in that case that the evidence of the insurance company overcame this presumption, and so in this case if the Court had permitted the respondent to obtain evidence upon the issue suddenly injected in this case it might well be that as a matter of law petitioner could not recover, but in any event, assuming an ambiguity in the policy, which counsel for respondent cannot see, the testimony of the plaintiff could do no more than make a question for a jury to decide, and as pointed out above, the right of a trial by jury was not waived and a definite exception was saved to the action of the Court in directing a verdict on its own motion.

In the case of National Equity Life Insurance Company v. Parker, supra, the clause there involved provided:

> "and of the payment in advance of $76.08, being the premium for one year's term insurance * * * ."

and as stated, it was there held that possession of the policy raised a presumption of payment which could be rebutted and overcome and in that case was overcome as a matter of law. It will be noted that the clause there involved could not possibly be construed as ambiguous, yet was not treated as being conclusive, as this Court has treated the clause here involved.

We respectfully submit that even if this Court should hold that the language of the policy was such as to permit the testimony offered in this case, the cause

should be reversed, with instructions to submit the issue of fact as to whether the premiums were actually paid to a jury.

For the foregoing reasons, respondent respectfully urges that this petition for rehearing be granted and that the judgment of the Circuit Court of Appeals be upon further consideration affirmed, or at least that the case be reversed and remanded to the trial court for:

> "• • • • the judgment of the jury on the verity of the explanation"

of the petitioner.

Respectfully submitted,

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Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, Thomas B. Pryor, Jr., counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 189.—October Term, 1938.

Mrs. Zillah Lyon, Petitioner, vs. Mutual Benefit Health and Accident Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 3, 1939.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner, (plaintiff below) brought suit as beneficiary in the District Court against respondent (defendant below) on a health and accident policy issued by respondent in 1926 to petitioner's husband. Plaintiff alleged that the insured was accidentally killed July 26, 1934, while the policy was in full force and effect insuring against death resulting from accidental causes. At the conclusion of plaintiff's evidence, defendant declined to offer any evidence and did no more than move for a peremptory instruction. Defendant's motion was based upon the contentions that (1) the policy was not in effect when insured was killed because defendant had exercised an option granted it by the policy to reject the quarterly premium due July 1, 1934; (2) that the "premium receipts themselves show that the policy terminated on the first day of July, 1934, prior to the time this loss occurred." Defendant's motion for peremptory instruction was denied, defendant excepted, and the court directed the jury to return a verdict for plaintiff. Defendant's exception was noted, the jury rendered verdict for plaintiff, and the court entered judgment upon the verdict.

The Court of Appeals reversed,[1] holding that the policy was term insurance and reserved to defendant the right to reject any quarterly premium on the due date, that defendant had properly exercised its option in rejecting the quarterly premium due July 1, 1934, and that the policy was, therefore, terminated prior to insured's death. The court further held that no competent evidence

[1] 95 Fed. (2d) 528.

had sustained plaintiff's allegations that the required premiums had been paid. We granted certiorari.[2]

In the view we take of the case, it is unnecessary to consider plaintiff's contention that the Court of Appeals erred in holding that defendant had the option to cancel the policy upon the due date of any quarterly premium. We find that there was competent and substantial evidence to sustain plaintiff's allegation that insured had paid premiums sufficient to keep the policy in effect up to and including the date of insured's death.

The evidence showed that:

The policy sued on was issued December 31, 1926; after advance payment of $74.00 for the first year's premium, the policy was delivered to insured; thereafter, all quarterly premiums were paid to the defendant's local treasurer located at Rogers, Arkansas (where the policy was sold and delivered) up to and including the quarterly premium due January 1, 1934; these premiums were usually paid in advance, but not always; before April 1, 1934, plaintiff as agent for the insured went to the office of the local treasurer at whose office she had paid all the other premiums; he could not be found at the office; a young girl in the office suggested that the payment be sent to Little Rock; plaintiff mailed that payment to Little Rock and received a receipt dated March 30, 1934; plaintiff had not then received, and never did receive any notice from the company that it had moved its office or changed its method of collecting premiums; July 1, 1934, when the next premium was due she went to the local treasurer's office and found it closed; diligent search for him disclosed that not only had his office been closed, but he had moved from the house in which he had formerly resided; continuing to search for the treasurer, she finally found him several days later early in the morning entering a car in front of his office; he declined to accept the premium, told her to send it to Little Rock and informed her that she should have received a notice from the company to that effect; that day, July 6, she bought a money order, "addressed the envelope just to the company at Little Rock" and mailed it; July 13, the Little Rock office of the company wrote her that it could not accept the payment because the Omaha home office had not sent an official receipt for this policy payment; in that letter and in a subsequent communication of July 26, the Little Rock office offered to reinstate the policy but with restricted benefits; on July 26, however, the insured was killed by accidental means within the terms of the policy. The defendant offered no evidence whatsoever.

First. The policy provides as to premium payments that "this policy is issued in consideration of . . . the payment in

[2] — U. S. —, cf. Bublin v. New York Life Ins. Co., 304 U. S. 202, 206.

advance of $74.00 the first year, and the payment in advance of . . . $16.00 dollars quarterly thereafter, beginning with April 1, 1927, is required to keep this policy in continuous effect." This language is clear and nothing elsewhere in the policy alters its meaning. True, the printed application signed by deceased, December 27, 1926, and upon which the policy was issued four days later, contains the printed question, "What is the premium?" and a typewritten answer, "$16.00 quarterly." However, this is not inconsistent with the provision of the policy for the payment of $74.00 in advance and $16.00 quarterly premiums. The provision for payment in advance of $74.00 the first year required payment before the date the policy took effect, which according to the policy was the date of issue. Under the language of this provision actual payment of a year's premium in advance purchased insurance for a year. The dates for further payments to extend the policy beyond a year could be and were fixed by the policy contract. Payment for the first year carried the policy to December 31, 1927, and the first quarterly payment, due by the policy's terms April 1, 1927 and paid in advance of that date, extended the policy another quarter beyond December 31, 1927. Each succeeding quarterly payment carried the policy a corresponding three months. The questions before the trial court were whether the $74.00 first payment was actually made, and whether thereafter quarterly payments were made in an amount sufficient to carry the policy from the end of the first year up to and including the quarterly period in which death of insured occurred.

Since the policy recites that "this policy is issued in consideration of . . . the payment in advance of $74.00 the first year . . . ," delivery of the policy prima facie established the fact of the advance payment of that amount.[3] This evidence was reinforced by plaintiff's testimony that the $74.00 was so paid. Defendant made no objection to this testimony. On cross-examination by defendant, plaintiff amplified her testimony as to why she paid the quarterly premium in April, 1927, after having already paid the premium for a whole year before the policy was delivered. She explained that this was because defendant's representative told her and the insured that "there were no days of grace included in

[3] Washington Fid. Nat. Ins. Co. v. Anderson, 187 Ark. 974, 976; National Equity Life Ins. Co. v. Parker, 190 Ark. 642, 644; cf. Splawn v. Martin, 17 Ark. 146, 153.

in the policy, but if we paid a year's premium in advance that would take the place of these days of grace."

Although defendant did not object to plaintiff's testimony of payment, and evoked explanation of it on cross-examination, the Court of Appeals, without any reference to governing State law,[4] concluded that the evidence was incompetent. That court believed this evidence represented an effort to alter the terms of the written policy contract by an oral agreement violating the provisions that "This policy . . . contains the entire contract of insurance," and "No agent has authority to change this policy or to waive any of its provisions." But this evidence of payment of premiums as required by the policy, did not affect the terms of the written contract. It was offered to prove the discharge of the insured's obligation under the contract. The evidence was material to establish the fact of payment. No statutes of Arkansas or decisions of the highest court of that State[5] have been pointed out which would make such relevant evidence incompetent.[6] The $74.00 payment for the first year, together with quarterly payments undisputedly made through April 1, 1934, carried the policy to January 1, 1935. We, therefore, find it unnecessary to consider whether the six days delay in paying the July 1, 1934 premium was excused by reason of attendant circumstances.

Second. The Conformity Act requires that "The practice, pleadings, and forms and modes of proceeding in civil causes . . . in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."[7]

Our attention has not been directed to any more authoritative Arkansas ruling governing the procedural effect of a request for a peremptory instruction without more, than the decision of the

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[4] See 28 U. S. C., Sec. 724.
Cf. D'Wolf v. Rabaud et al., 1 Pet. 476, 502; Wilcox et al. v. Hunt et al., 13 Pet. 378, 379; Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228; cf. Erie R. Co. v. Tompkins, 304 U. S. 64.

[5] Cf. Erie R. Co. v. Tompkins, *supra*.

[6] Cf. Splawn v. Martin, *supra*; Vaughn et al. v. Taylor et al., 18 Ark. 65, 79; Borden et al. v. Peay, Receiver, 20 Ark. 293, 306; Hill v. First Nat. Bank of Malvern, 129 Ark. 265, 269; Lay, Administrator v. Galusa, 130 Ark. 167, 170.

[7] 28 U. S. C., Sec. 724.

Supreme Court of Arkansas in *A. B. Smith Lumber Co.* v. *Portis Bros.*, 140 Ark. 356. There the Court said (at 358, 359, 360): "The cause . . . proceeded to a hearing upon the pleadings and evidence. When the evidence was concluded, appellant requested a peremptory instruction, and no other. The court refused the instruction over the objection of appellant, and, on its own motion, instructed the jury to return a verdict in favor of appellees . . . over the objection and exception of appellant. . . . and the court, on its own motion, gave a peremptory instruction for appellee. The request for a peremptory instruction by appellant and the giving of the peremptory instruction by the court for the adverse party was tantamount to submitting the case to the court sitting as a jury, and the court's finding became a verdict as much so as if it had been rendered by a jury upon the issues and evidence. . . . So the question presented by this record is not whether there was sufficient evidence in the record to warrant the court in sending the case to the jury upon the issue of whether or not the undertaking was collateral, but the question is, Was there any legal evidence to support the finding of the court that the undertaking was original?"

This rule of procedure closely approaches that frequently approved by this Court on the same subject, to the effect that "'Where both parties request a peremptory instruction and do nothing more they thereby assume the facts to be undisputed and, in effect, submit to the trial judge the determination of the inferences proper to be drawn therefrom'. And upon review, a finding of fact by the trial court under such circumstances must stand if the record discloses substantial evidence to support it."[8]

Here, there was ample evidence upon which to justify the verdict. Defendant obviously proceeded—after the evidence was closed—upon the belief that the facts and all the inferences to be drawn therefrom raised only a question of law for the court—not one of fact for the jury; and plaintiff acquiesced. Neither defendant nor plaintiff did anything to indicate a desire or belief that the jury should pass upon any facts. Thus, the District Court sitting in Arkansas, having jurisdiction only by reason of diversity of citizenship and trying a suit involving an Arkansas contract, followed the procedural rule announced by the highest court of that State.

[8] Williams v. Vreeland, 250 U. S. 295, 298; Aetna Ins. Co. v. Kennedy, 301 U. S. 389, 393.

While litigants in Federal courts cannot—by rules of procedure—be deprived of fundamental rights guaranteed by the Constitution and laws of the United States, the local Arkansas rule followed by the District Court does not result in such deprivation. In effect, that local rule is practically identical with the Federal rule which treats a request by both parties for peremptory instructions without more as a submission of issues of fact to the court. It is essential that the right to trial by jury be scrupulously safeguarded, and a State rule of procedure entrenching upon this right would not require observance by Federal courts.[9] However, this Arkansas procedural rule—so closely approximating the Federal rule—does not amount to a prohibited invasion of Federal rights. Since the District Court followed the Arkansas procedural rule, and the verdict and judgment were supported by competent and substantial evidence, it follows that the Court of Appeals erroneously reversed the District Court's judgment. The judgment of the Court of Appeals is, therefore, reversed and that of the District Court is affirmed.

Mr. Justice ROBERTS did not participate in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[9] Cf. Davis v. Wechsler, 263 U. S. 22.

SUPREME COURT OF THE UNITED STATES.

No. 189.—October Term, 1938.

Mrs. Zillah Lyon, Petitioner, *vs.* Mutual Benefit Health and Accident Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 3, 1939.]

Mr. Justice Butler.

Mr. Justice McReynolds and I are unable to accept the opinion or to agree with the judgment of the court just announced.

We are of opinion that the judgment of the circuit court of appeals should be reversed, and that, for the reasons given in the separate opinion of Circuit Judge Stone, 95 F. 2d 528, 534, the case should be remanded to the district court for proceedings in accordance with that opinion.